APPENDIX E

Case No: D010801

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA;
THE CITY OF NATIONAL CITY, a Municipal Corporation,
Respondents

v.

STEVEN D. WIENER, et al.,
Appellants

Superior Court Case No: 578784

FROM THE SUPERIOR COURT
SAN DIEGO COUNTY
HONORABLE VINCENT P. DI FIGLIA, JUDGE

PETITION FOR REHEARING

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D010801

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT,
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
STEVEN D. WIENER, ET AL.,
Defendant and Appellant.

PETITION FOR REHEARING

To the Honorable Daniel J. Kremer, Presiding Justice, and to the Honorable Associate Justices of the Court of Appeal in and for the Fourth Appellate District, Division One:

Petitioner respectfully requests a rehearing from this Honorable Court in the above-entitled case decided March 26, 1991, pursuant to Rule 27 of the California Rules of Court following a nonpublished opinion reversing a judgment declaring National City Municipal Code § 18.69.030 constitutional.

REASONS FOR GRANTING THE REHEARING

The rehearing is requested in order to obtain the court's ruling on the first cause of action, the common law public nuisance.

Petitioner is not requesting consideration of any new matter nor reconsideration of the statutory public nuisance. Petitioner requests the court direct its attention to a matter presented and briefed to this court i.e. that Chuck's constituted a common law public nuisance.

Petitioner requests a rehearing and that a decision on the appeal be pronounced in all respects because it is vital to the interests of the parties, to the complete record in this case, and may operate to affect future litigation.

THE COMMON LAW PUBLIC NUISANCE WAS PROPERLY BEFORE THIS COURT

It is clear all parties acknowledge there are two causes of action (Appellant's Opening Brief p. 4, Respondent's Opening Brief p. 1, line 26-28 and p. 2, lines 1-5, Decision of this Court p. 1 and p. 2 n. 13.) Appellant's Opening and Reply Briefs addressed in argument only the second cause of action, the statutory public nuisance under National City Municipal Code § 18.69.030.

However, Respondent's Opening Brief submitted to the court also addressed the *first* cause of action, the common law public nuisance, (p. 10, lines 9-18 and p. 12, lines 14 and 15).

As such, a ruling on the injunction based on the common law nuisance is under the purview of this court.

THE COURT'S DECISION DID NOT ADDRESS THE PETITIONER'S FIRST CAUSE OF ACTION, A COMMON LAW PUBLIC NUISANCE

The decision focused on a question of law, the troubling issue of the constitutionality of the ordinance creating the statutory public nuisance. The court appropriately considered that issue *de novo.*

However, the existence of a common law public nuisance, a question of fact, was not addressed by this court.

THE JUDGMENT OF THE TRIAL COURT WAS THAT CHUCK'S CONSTITUTED A PUBLIC NUISANCE

The judgment below decreed Chuck's a public nuisance (C.T. 435, lines 1-8). This court must presume that the evidence and findings support that judgment. (*Kompf v. Morrison* (1946) 73 C.A.2d 284), and further that the trial court "based its decision on appropriate findings and disregarded incorrect or insufficient ones." (*Brewer v. Simpson* (1960) 53 C.2d 567, 583, 2 Cal.Rptr. 609, 616.)

While it can be argued that the trial court's ruling on § 18.69.030 obviated the necessity for a specific ruling on the common law nuisance, it is equally persuasive that the court *did* render judgment based in part on that cause of action and did in

fact find Chuck's to be a common law public nuisance. (R.T. p. 389 line 14, C.T. p. 391 line 28.)

That being the case, that factual finding should be sustained if there is any substantial evidence to support it. *Marriage of Mix* (1975) 14 C.3d 604, 614 122 Cal.Rptr. 79, 85.

In its decision this court said, *inter alia,*

> "The evidence showed the deleterious effects of Chuck's operation on the adjacent neighborhood." (p. 7)

The above is the gravamen of a public nuisance under Civil Code §§ 3479 and 3480 and makes it clear the court did find substantial evidence to support the trial court's determination.

THE JUDGMENT SHOULD BE AFFIRMED AS TO THE COMMON LAW PUBLIC NUISANCE

If the decision of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the court reached its conclusion. 9 Witkin, California Procedure, Appeal § 259.

> "The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." *Davey v. Southern Pac. Co.* (1897) 116 C. 325, 329, 48 p. 117. *International Assn. of Cleaning and Dye House Workers v. Landowitz* (1942) 20 C.2d 418, 423.

If the lower court's decision was correct on any legal ground, it will be affirmed even if the reasons cited are wrong. *West Pico Furniture v. Superior Court* (1961) 56 C.2d 407 (improper constitutional standard used to determine grant of summary judgment deemed irrelevant, when grant was proper under correct standard.)

The trial court's judgment granted the injunction because Chuck's constituted a public nuisance. This court's reversal of one of the bases for that injunction should not result in a reversal of the entire judgment.

CONCLUSION

Therefore, petitioner respectfully requests that a rehearing be granted and this Court reconsider and modify its decision in this case to reflect the following: that the judgment granting the injunction in this case be affirmed in part, as to the common law public nuisance, and reversed in part, as to the statutory nuisance.

Dated: April , 1991

LINDA KAYE HARTER
Assistant City Attorney
Attorney for Respondents

APPENDIX F

APPENDIX F

Case No. D010801

In The

SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA;
THE CITY OF NATIONAL CITY,
a Municipal Corporation,
Plaintiffs and Appellants

vs.

STEVEN D. WIENER; STEVEN D. WIENER
DBA CHUCK'S BOOKSTORE; PATRICIA
SANDERS; DOES 1-30, inclusive
Defendants and Respondents

Appeal from the Superior Court of San Diego County
Honorable Vincent P. DiFiglia, Judge

PETITION FOR REVIEW

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Case No. D010801

In The
SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA;
THE CITY OF NATIONAL CITY,
a Municipal Corporation,
Plaintiffs and Appellants

vs.

STEVEN D. WIENER; STEVEN D. WIENER
dba CHUCK'S BOOKSTORE; PATRICIA SANDERS;
DOES 1-30, inclusive
Defendants and Respondents

Appeal from the Superior Court of San Diego County
Honorable Vincent P. DiFiglia, Judge

PETITION FOR REVIEW

ISSUES PRESENTED

1. Did the Court of Appeal ruling contradict existing case law, relating to the regulation of conduct protected by the First Amendment?

2. Is National City's "dispersal" type ordinance unconstitutional?

3. Did the Court of Appeal err in failing to uphold the injunction granted by the trial court, based on the first cause of action, a common law public nuisance?

4. Pending review should the injunction remain?

INTRODUCTION

This case involves an adult entertainment establishment known as Chuck's Books. It retails adult books, sexual paraphernalia and houses several peep show devices. In 1986 Chuck's opened its doors without benefit of an occupancy permit, sign permit or business license. The patrons of Chuck's engaged in sex in the peep booths, loitered in the alley located behind Chuck's and generally annoyed and disturbed residents. The location of Chuck's is within 1,000 feet of a residential zone, within 1,500 feet of an existing adult business, the Pussycat Theater, and within 1,500 feet of a park, all in violation of National City Municipal Code Section 18.69.030, a zoning ordinance.

Thereafter the City brought an action to enjoin the operation of Chuck's, alleging two causes of action. The first cause of action alleged a common law public nuisance under Civil Code Sections 3479 and 3480 in that Chuck's unlawfully "interferes with and is injurious to the orderly and planned use of land resources, is indecent or offensive to the senses, and obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property."

The second cause of action alleged a statutory public nuisance in that Chuck's violated the distance requirements of the City's zoning ordinance.

At the trial Chuck's challenged the zoning ordinance as being overly restrictive and unconstitutional. In a 16 page statement of decision the trial court ruled the ordinance constitutional, declared Chuck's to be a public nuisance and granted the injunction.

A year and one-half later the Fourth District Court of Appeal, although citing the same cases relied on by the trial court, reversed the judgment, and declared the ordinance unconstitutionally restrictive. The Court did not address the first cause of action.

A request for re-hearing to obtain a ruling on the first cause of action was denied without comment.

A review by the Supreme Court is necessary in this case to reconcile the Court of Appeal's ruling with existing case law, and to pronounce a decision in all respects for this lawsuit.

(1)

DID THE COURT OF APPEAL RULING CONTRADICT EXISTING CASE LAW RELATING TO THE REGULATION OF CONDUCT PROTECTED BY THE FIRST AMENDMENT?

The law is clear that cities may impose valid time, place and manner limits on adult entertainment businesses, as long as the limits (1) are designed to serve a substantial governmental interest and (2) do not "unreasonably limit alternative avenues of communication." (*Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 46-47, 89 L.Ed. 29.)

Evidence admitted in the instant case fulfilled the first consideration in *Renton*. As to the second consideration, Chuck's alleged that the high cost of new construction precluded them from relocating to another available, legally zoned location and landlords of existing buildings refused to rent to them, thus they were unreasonably limited.

The Court of Appeal, after a thoughtful discussion, agreed, saying "[w]e infer such an endeavor would not be economically

feasible for the typical adult business entrepreneur." (Opinion p. 14)

The Court below made this inference, even though there was no direct evidence that the alternative of relocating was not economically viable, and in the face of the ruling in *Renton* that "[t]he inquiry for First Amendment purposes is *not concerned with economic impact*" (emphasis added). *Young v. American Mini Theaters*, 427 U.S. 50 at 78, 49 L.Ed. 2d 310.)

Both the Federal and State courts have considered the issue of "commercial viability" and have concluded:

> "That respondents [adult businesses] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.
>
> ". . . . we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." (*Renton* at p. 53.)

Addressing the very same issue in *Young*, Ibid at 78, the court said:

> "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage." See e.g. *Zahn v. Bd. of Public Works*, 274 U.S. 325 (1927) (*Young* at 78).

The "impediments to Chuck's relocation" the Court of Appeal alluded to (Opinion p.13) are impediments imposed by geography and the free marketplace, *not* by governmental action.

The Court of Appeal decision in this case contradicts existing case law in this area thus requiring Supreme Court review.

(2)

IS NATIONAL CITY'S "DISPERSAL" TYPE ZONING ORDINANCE UNCONSTITUTIONAL?

The purpose of the distance requirements contained in Section 18.69.030 is set forth in Section 18.69.010 as follows:

> "A. It is the purpose of this chapter to establish reasonable and uniform regulations to prevent the continued concentration of adult entertainment establishments, as defined herein, within the city of National City.
>
> "B. It is the intent of this chapter that these regulations be utilized to prevent problems of blight and deterioration which accompany and are brought about by the concentration of adult entertainment establishments."

The use of "dispersal" regulations to prevent the concentration of adult businesses has been sanctioned by the United States Supreme Court. (*Young; Renton*, Ibid.)

In *Renton*, supra, appellees, the owners of adult theaters, sought declaratory and injunctive relief on First and Fourteenth Amendment grounds against a zoning ordinance of the City of Renton, Washington, which prohibited adult theaters from locating within 1,000 feet of any residential zone, dwelling church, park or school. In a decision rendered on February 25, 1986, the United States Supreme Court, with two justices dissenting, upheld the validity of the Renton ordinance.

In analyzing the Renton ordinance, the Supreme Court recognized that the ordinance treated theaters that specialize in adult films differently from other kinds of theaters. However, the court found that where the municipality's "predominate" concerns were with the secondary effects of adult theaters, and not with the content of adult films themselves, the ordinance will be upheld as furthering the city's valid zoning interests and will not be considered a suppression of free expression. (*Renton*, 89 L.Ed. 2d at pp. 37-38.) Where a zoning ordinance is designed to combat the undesirable secondary effects of adult businesses, the ordinance is to be reviewed under the standard applicable to "content-neutral" time, place, and manner regulations, namely, whether the ordi-

nance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. (*Renton*, 89 L.Ed. 2d at pp. 38-39.)

In the case of Renton ordinance, the Supreme Court found that a city's "interest in attempting to preserve the quality of urban life" is a sufficient governmental interest to justify the enactment of the ordinance. (*Renton*, 89 L.Ed. 2d at p. 39.) The Court further held that a city, in enacting such an ordinance, is not required to conduct new studies or produce evidence independent of that generated by other cities, but may rely on the experience of other cities with respect to the effects of adult theaters and the need for adoption of laws to regulate them. (*Renton*, 89 L.Ed. 2d at p. 40.)

The Court in Renton also held that a city may regulate adult theaters by dispersing them, as in Detroit (*Young, Ibid.*), or by concentrating them, as in Renton.

> "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (Citing *Young v. American Mini Theatres*, 49 L.Ed. 2d 41.)

The final issue addressed by the *Renton* Court was whether the ordinance allowed for reasonable alternative avenues of communication. The Court found that over five percent of the land area of Renton was open to use as adult theater sites. Although the theater owners agreed that there were virtually no "commercially viable" sites for adult theaters in Renton, the Court made the landmark statement

> "that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." (*Renton*, 89 L.Ed. 2d at p. 42.)

The California courts have also upheld municipal ordinances imposing distance requirements upon adult entertainment establishments. An adult entertainment ordinance substantially the same as Chapter 18.69 of the National City Municipal was validated in *Walnut Properties v. Long Beach City Council* (1980) 100 Cal.App.3d 1018, 161 Cal.Rptr. 411.) In that decision, the Court rejected the theater operator's contention that the city could not create zoning regulations applicable to theaters based on the content of films exhibited therein. The Fourth District Court of Appeal upheld an adult entertainment ordinance in *Castner v. City of Oakland* (1982) 129 Cal.App.3d 94, 180 Cal.Rptr. 682, wherein the ordinance of the City of Oakland was challenged on constitutional grounds by the operator of an adult bookstore. In *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 200 Cal.Rptr. 47, the Fourth District upheld the validity of the dispersal ordinance of the City of San Diego against the constitutional challenge of the owner of an adult theater. The San Diego ordinance reviewed in *Strand* is nearly identical to Chapter 18.69 of the National City Municipal Code. In *City of Vallejo v. Adult Books* (1985) 167 Cal.App.3d 1169, 213 Cal.Rptr. 143, the First District Court of Appeal upheld a dispersal ordinance which imposed distance requirements upon adult businesses, and allowed such businesses to be located in only these zoning districts. Although the practical effect of the Vallejo ordinance was to impose "considerable economic difficulty" upon locating an adult business in the city, the court concluded that there was no unconstitutional restriction upon access to adult material.

The National City dispersal ordinance is one that satisfies both prongs of Renton, and has passed constitutional muster in other cities. Its constitutionality needs to be addressed by the Supreme Court.

(3)

DID THE COURT OF APPEAL ERR IN FAILING TO UPHOLD THE INJUNCTION GRANTED BY THE TRIAL COURT, BASED ON THE FIRST CAUSE OF ACTION A COMMON LAW PUBLIC NUISANCE?

A. THE COMMON LAW PUBLIC NUISANCE WAS PROPERLY BEFORE THE COURT OF APPEAL

It is clear all parties acknowledge there are two causes of action (Appellant's Opening Brief p. 4, Respondent's Opening Brief p. 1, lines 26-28 and p. 2, lines 1-5, Opinion of the Court of Appeal p. 1 and p. 2 n. 13.) Chuck's Opening and Reply Briefs addressed in argument only the second cause of action, the statutory public nuisance under National City Municipal Code Section 18.69.030.

However, the City's Opening Brief submitted to the court also addressed the *first* cause of action, the common law public nuisance, (p. 10, lines 9-18 and p. 12, lines 14 and 15).

As such, a ruling on the injunction *based on the common law nuisance* was under the purview of that court.

B. THE COURT'S DECISION DID NOT ADDRESS THE PETITIONER'S FIRST CAUSE OF ACTION, A COMMON LAW PUBLIC NUISANCE

The written decision focused on a question of law, the issue of the constitutionality of the ordinance creating the statutory public nuisance. The court appropriately considered that issue *de novo.*

However, the existence of a common law public nuisance, a question of fact, was not addressed by the court.

Several witnesses at the trial testified to the offensive goings on, in and around Chuck's, and how the activity interfered with their property rights. Their testimony was recited in the trial court's Statement of Decision. For the Court of Appeal to omit an issue briefed to them, and thereafter to deny a rehearing to include it, is error. It leaves the parties with an incomplete resolution to a lawsuit; a lawsuit that each side has pursued for over four years.

C. THE JUDGMENT OF THE TRIAL COURT WAS THAT CHUCK'S CONSTITUTED A PUBLIC NUISANCE

The judgment of the trial court decreed Chuck's a public nuisance (C.T. 435, lines 1-8). This court must presume that the evidence and findings support that judgment. (*Kompf v. Morrison* (1946) 73 C.A.2d 284), and further that the trial court "based its decision on appropriate findings and disregarded incorrect or insufficient ones." (*Brewer v. Simpson* (1960) 53 C.2d 567, 583, 2 Cal.Rptr. 609, 616.)

While it can be argued that the trial court's ruling on Section 18.69.030 obviated the necessity for a specific ruling on the common law nuisance, it is equally persuasive that the court *did* render judgment based in part on that cause of action and did in fact find Chuck's to be a common law public nuisance. (R.T. p. 389 line 14, C.T. p. 391 line 28.)

That being the case, the factual finding should be sustained if there is any substantial evidence to support it. *Marriage of Mix* (1975) 14 C.3d 604, 614 122 Cal.Rptr. 79, 85.

In its decision the Court of Appeal said, *inter alia*, "[t]he evidence showed the deleterious effects of Chuck's operation on the adjacent neighborhood." (p. 7)

The above is the very essence of a public nuisance under Civil Code Sections 3479 and 3480 and makes it clear the Court of Appeal did find substantial evidence to support the trial court's determination.

D. THE JUDGMENT SHOULD BE AFFIRMED AS TO THE COMMON LAW PUBLIC NUISANCE

If the decision of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the court reached its conclusion. 9 Witkin, California Procedure, Appeal § 259.

> "The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question

> of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." *Davey v. Southern Pac. Co.* (1897) 116 C. 325, 329, 48 p. 117. *International Assn. of Cleaning and Dye House Workers v. Landowitz* (1942) 20 C.2d 418, 423.

If the lower court's decision was correct on any legal ground, it will be affirmed even if the reasons cited are wrong. *West Pico Furniture v. Superior Court* (1961) 56 C.2d 407 (improper constitutional standard used to determine grant of summary judgment deemed irrelevant, when grant was proper under correct standard.)

The trial court's judgment granted the injunction because Chuck's constituted a public nuisance. The Court of Appeal's reversal of *one* of the bases for that injunction should not have resulted in a reversal of the entire judgment.

(4)

PENDING REVIEW SHOULD THE INJUNCTION REMAIN?

A. THE FIRST AMENDMENT DOES NOT PRECLUDE ISSUANCE OF AN INJUNCTION AGAINST AN ACTIVITY WHICH CONSTITUTES A NUISANCE OR A VIOLATION OF ZONING LAWS

As already pointed out, the purpose of the National City adult entertainment ordinance is not to interfere with or suppress activities protected by the First Amendment, but to further legitimate zoning interests by eliminating the negative secondary effects of adult businesses. This type of regulation has been sanctioned by the courts. (*Renton; Walnut Properties; Castner; Strand; City of Vallejo*; Ibid.)

The fact that defendants' business is a bookstore does not entitle defendants to operate that business when it constitutes a common law nuisance. Defendants' business generates excessive noise, their customers annoy and harass adjacent residents, and the business may properly be enjoined. While great protection is afforded First Amendment rights, the residents who live in proximity to defendants' adult bookstore are also entitled to protection.

To paraphrase the language of Civil Code Section 3479, the offensive comments directed to residents by the loitering customers of Chuck's Bookstore, together with the noise generated by the bookstore, are "indecent or offensive to the sense," constitute an "obstruction to the free use of property", and interfere "with the comfortable enjoyment of life or property."

> "There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it artificially using his own land." (*Ohaver v. Fenech* (1928) 206 Cal. 118, 273 P. 555, 558).

B. PLAINTIFFS ARE NOT SEEKING TO COMPEL DEFENDANTS TO PERFORM AFFIRMATIVE ACTS, BUT TO REFRAIN FROM COMMITTING UNLAWFUL ACTS. IN SUCH A CASE, THE COURT HAS BROAD DISCRETION TO GRANT AN INJUNCTION.

Where an attempt is made by a plaintiff to compel the defendant to perform affirmative acts, the court may be reluctant to grant relief. However, the court's discretion to grant prohibitory relief, such as that sought in the instant case, is much broader.

In *People v. Columbia Research Corp.* (1977) 71 Cal.App.3d 607, 139 Cal.Rptr. 517, the court upheld the trial court's issuance of a preliminary injunction restraining defendants from engaging in certain promotional practices pertaining to their mail order business. The court expressly rejected defendants' contention that the injunction constituted an impermissible restriction upon free speech.

In *Riviello v. Journeymen Barbers, Etc.* (1948) 88 Cal.App.2d 499, 199 P.2d 400, the court of appeal reversed the trial court's denial of a preliminary injunction against defendants' picketing of plaintiffs' barber shop.

CONCLUSION

The Court of Appeal's decision conflicts with *Renton* and *Young*, the benchmark cases in this area of first amendment protected speech.

Ordinances nearly identical to the National City ordinance have survived all manner of constitutional attacks, including those based on the First and Fourteenth Amendments.

The injunction granted by the trial court was based on Chuck's being "a public nuisance." The Court of Appeal failed to issue a ruling on the common law public nuisance, a matter briefed and submitted to them.

Because of the inchoate quality of the Court of Appeal decision the Supreme Court should allow the injunction to remain, pending a review of this important and timely issue: To what extent can cities set limits on first amendment protected speech, in order to protect the quality of urban life within their borders?

Dated: May 3, 1991

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